UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

ROBERT KAW and GENETA KAW, et al.,	)	
Plaintiffs	)	
v.	)	
COMMISSIONER, MAINE DEPARTMENT OF HUMAN SERVICES,	)	*Civil No. 90-0113 P*
Defendant and Third-Party Plaintiff)	)	
v.	)	
LOUIS W. SULLIVAN, M.D., Secretary, United States Department of Health & Human Services,	)	
Third-Party Defendant	)	

RECOMMENDED DECISION ON MOTION FOR CERTIFICATION OF PLAINTIFF CLASS

In this declaratory judgment and injunctive relief action, the plaintiffs challenge as violations of 42 U.S.C. ' ' 1396d(p) and 1983 the method by which the Commissioner of the Maine Department of Human Services calculates their income eligibility for a provision in the Medicaid program whereby Medicaid ``buys in'' and pays an individual's Part B Medicare premium and related expenses. Before the court now is the plaintiffs' motion for certification of the following class:

> All married individuals in the State of Maine who anytime from January 1, 1989 to the present have been or will become eligible for

> Medicare Part A benefits, whose resources do not exceed twice the SSI resource limit and whose marital income, divided in half and minus state and federal SSI-related income disregards for an individual, was or is below 85% of the Federal poverty level during the period January 1, 1989 to December 31, 1989 and/or below 90% of the Federal poverty level between January 1, 1990 to the present.

The defendant, apparently conceding that the requirements of Fed. R. Civ. P. 23 have been satisfied, objects only to that part of the proposed class definition which includes individuals whose claims arose prior to April 26, 1990, the date on which the complaint was filed. The Commissioner asserts that none of the proposed class members sought administrative review before commencement of this suit and that the State of Maine's Eleventh Amendment immunity bars suit against it in federal court seeking payment of benefits from public funds. Both arguments fail.

It is settled law that exhaustion of administrative remedies is not a prerequisite to a ' 1983 action. *Patsy v. Board of Regents*, 457 U.S. 496, 500-01, 516 (1982); *Miller v. Town of Hull*, 878 F.2d 523, 530 (1st Cir.) *cert. denied, 110 S. Ct 501 (1989)*. Because this action is grounded in part on a ' 1983 claim, exhaustion is not required.

While it is true that the Eleventh Amendment bars the court from awarding retroactive benefits to be paid from the state's general revenues where the state does not consent to suit, *Edelman v. Jordan*, 415 U.S. 651, 664-65 (1974); *Wilcox v. Ives*, 676 F. Supp. 355, 361 (D. Me. 1987), *aff'd*, 864 F.2d 915 (1st Cir. 1988), in the instant action the plaintiffs do not expressly seek such relief. *See* Complaint & VIII Request for Relief. Rather, they seek non-monetary prospective relief in the form of a declaration that the defendant's eligibility determination policy is unlawful and an order requiring the defendant to notify all class members of their rights to have their ``buy in'' eligibility determined by a lawful method and to be reimbursed for their incurred covered costs. They also seek an injunction requiring the defendant to amend his policy, retroactive to January 1, 1989, to conform to their

reading of the federal-law requirements governing the Medicare program. *Id.* Such relief is not barred by the Eleventh Amendment. *Quern v. Jordan*, 440 U.S. 332, 347-48 (1979); *Edelman v. Jordan*, 415 U.S. at 662-63, 667-68; *Ex parte Young*, 209 U.S. 123 (1908); *Wilcox v. Ives*, 676 F. Supp. at 361. Whether, to what extent and from whom any retroactive monetary relief may be available in this case is an issue for another day. *See, e.g., Foggs v. Block*, 722 F.2d 933, 941 n.6 (1st Cir. 1983), *rev'd on other grounds*, 472 U.S. 115 (1985).

For the foregoing reasons, I recommend that the plaintiffs' motion for certification of the defined class be ***GRANTED*** and that plaintiffs' counsel be ***DIRECTED*** to submit a proposed order confirming the class as defined in their motion.

NOTICE

A party may file objections to those specified portions of a magistrate's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. ' 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated at Portland, Maine this 8th day of November, 1990.

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David M. Cohen
United States Magistrate